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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Harrell v. City and County of Honolulu
No. 06-16142

RAWLINSON, Circuit Judge, dissenting in part:

I respectfully dissent from that portion of the disposition concluding that the district court acted within its discretion when it denied Plaintiff Matthew Harrell's motion for a new trial. Although I expressly decline to join the extended discussion of Harrell's challenges to the district court's evidentiary rulings, denial of his requested motion for a mistrial and denial of his motion for judgment as a matter of law, I agree that the district court's rulings on those issues should be affirmed.

However, I respectfully dissent from that portion of the disposition affirming the denial of Harrell's motion for a new trial. In my view, the district court abused its discretion when it denied Harrell's motion for a new trial because the record contains no evidence to support the jury's verdict.

From my perspective, the fallacy in the conclusion that evidence in the record supports the jury's verdict stems from a profound misapplication of the caselaw interpreting applicable discrimination statutes.

There is no dispute that the reason given by the decisionmaker for failing to select Harrell was his performance at the audition. However, that reason is clearly

pretextual because despite the allegedly deficient performance, Harrell was nevertheless rated qualified for the position. Once an applicant is deemed qualified, it defies commonsense to countenance later rejection of that applicant on the basis that he is no longer qualified. *See Norris v. City and County of San Francisco*, 900 F.2d 1326, 1330 (9th Cir. 1990) (providing that pretext is established if an employer's explanation is unworthy of credence). Because I am convinced that the employer's claim that Harrell was unqualified is not supported by the record, I conclude that the record does not support the jury's finding of no discrimination. As a result, I would hold that the district court abused its discretion when it denied Harrell's motion for a new trial. *See Alford v. Haner*, 446 F.3d 935, 936 (9th Cir. 2006) (recognizing that a new trial should be granted if the record contains no evidence to support the verdict).